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MEMORANDUM FOR:



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Deputy Director for Policy, Analysis &
Evaluation/OP

FROM:



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Legislation Division
Office of Congressional Affairs

SUBJECT:

Drug Testing Provision in FY87 Supplemental
Appropriations Bill

1. Attached is a copy of the conference report pertaining to the above-captioned subject. The Agency has been placed on the list of exempt agencies having a drug testing plan in effect on 15 September 1986, which means that it may continue its testing program without interruption.

2. The Bill states that these exempt agencies are expected to comply fully with the Executive Order within six months after the Bill is signed into law. Executive Order 12564 states that nothing in it will limit the authorities of the Director of Central Intelligence under the National Security Act of 1947 and that implementation of the Executive Order within the Intelligence Community is subject to the approval of the head of the intelligence agency. The Bill also states that the exempt agencies are to adopt laboratory guidelines within 90 days after they take effect.

3. You may refer any comments to me by telephoning on



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Attachment:
As stated

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which there are significant numbers of homeless veterans) under the jurisdiction of the Administrator of Veterans' Affairs and for furnishing domiciliary care in such beds to eligible veterans, primarily homeless veterans, who are in need of such care, and of which \$5,000,000 shall be available, notwithstanding section 2(c) of Public Law 100-6, for furnishing care under section 620C of title 38, United States Code, to homeless veterans who have a chronic mental illness disability: Provided, That not more than \$500,000 of the amount available in connection with furnishing care under such section 620C shall be used for the purpose of monitoring the furnishings of such care and, in furtherance of such purpose, to maintain an additional 10 full-time-employee equivalents: Provided further, That nothing in this paragraph shall result in the diminution of the conversion of hospital-care beds to nursing-home-care beds by the Veterans' Administration.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

The conferees have agreed to provide the following levels for those homeless programs under the jurisdiction of the Department of Housing and Urban Development, the Federal Emergency Management Agency, and the Veterans' Administration.

	House bill	Senate bill	Conference agreement
Department of Housing and Urban Development			
Grants for facilities to assist the homeless	\$75,000,000		
Transitional Housing Demonstration Program	30,000,000	\$80,000,000	\$80,000,000
Emergency Shelter Grants Program	100,000,000		50,000,000
Permanent housing for handicapped homeless persons	25,000,000		
Section 8 existing		50,000,000	
Section 8 moderate rehabilitation (SRO)		40,000,000	35,000,000
Supplemental assistance grants			15,000,000
Federal Emergency Management Agency emergency food and shelter	50,000,000		10,000,000
Veterans Administration Veterans Domiciliary Program (by transfer)	(20,000,000)	10,000,000	15,000,000
Chronic Mental Illness Program		10,000,000	5,000,000
Total	280,000,000	190,000,000	210,000,000

¹ Includes: \$15,000,000 for handicapped housing, \$20,000,000 for transitional housing for families, and \$30,000,000 for transitional housing for institutionalized individuals

TITLE V

GENERAL PROVISIONS

Amendment No. 416: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment, as follows:

In lieu of the matter stricken and insert, insert the following:

SEC. 503. (a)(1) Except as provided in subsection (b) or (c), none of the funds appropriated or made available by this Act, or any other Act, with respect to any fiscal year, shall be available to administer or implement any drug testing pursuant to Executive Order Numbered 12564 (dated September 15, 1986), or any subsequent order, unless and until—

(A) the Secretary of Health and Human Services certifies in writing to the Committees on Appropriations of the House of Representatives and the Senate, and other appropriate committees of the Congress, that—

(i) each agency has developed a plan for achieving a drug-free workplace in accordance with Executive Order Numbered 12564

and applicable provisions of law (including applicable provisions of this section);

(ii) the Department of Health and Human Services, in addition to the scientific and technical guidelines dated February 13, 1987, and any subsequent amendments thereto, has, in accordance with paragraph (3), published mandatory guidelines which—

(I) establish comprehensive standards for all aspects of laboratory drug testing and laboratory procedures to be applied in carrying out Executive Order Numbered 12564, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of drug tests and strict procedures governing the chain of custody of specimens collected for drug testing;

(II) specify the drugs for which Federal employees may be tested; and

(III) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform drug testing in carrying out Executive Order Numbered 12564; and

(iii) all agency drug-testing programs and plans established pursuant to Executive Order Numbered 12564 comply with applicable provisions of law, including applicable provisions of the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), title 5 of the United States Code, and the mandatory guidelines under clause (ii);

(B) the Secretary of Health and Human Services has submitted to the Congress, in writing, a detailed, agency-by-agency analysis relating to—

(i) the criteria and procedures to be applied in designating employees or positions for drug testing, including the justification for such criteria and procedures;

(ii) the position titles designated for random drug testing; and

(iii) the nature, frequency, and type of drug testing proposed to be instituted; and

(C) the Director of the Office of Management and Budget has submitted in writing to the Committees on Appropriations of the House of Representatives and the Senate a detailed, agency-by-agency analysis (as of the time of certification under subparagraph (A)) of the anticipated annual costs associated with carrying out Executive Order Numbered 12564 and all other requirements under this section during the 5-year period beginning on the date of the enactment of this Act.

(2) Notwithstanding subsection (g), for purposes of this subsection, the term "agency" means—

(A) the Executive Office of the President;

(B) an Executive department under section 101 of title 5, United States Code;

(C) the Environmental Protection Agency;

(D) the General Services Administration;

(E) the National Aeronautics and Space Administration;

(F) the Office of Personnel Management;

(G) the Small Business Administration;

(H) the United States Information Agency; and

(I) the Veterans' Administration;

except that such term does not include the Department of Transportation or any other entity (or component thereof) covered by subsection (b).

(3) Notwithstanding any provision of chapter 5 of title 5, United States Code, the mandatory guidelines to be published pursuant to subsection (a)(1)(A)(ii) shall be published and made effective exclusively according to the provisions of this paragraph. Notice of the mandatory guidelines proposed by the Secretary of Health and Human Services shall be published in the Federal Register, and interested persons

shall be given not less than 60 days to submit written comments on the proposed mandatory guidelines. Following review and consideration of written comments, final mandatory guidelines shall be published in the Federal Register and shall become effective upon publication.

(b)(1) Nothing in subsection (a) shall limit or otherwise affect the availability of funds for drug testing by—

(A) the Department of Transportation;

(B) Department of Energy, for employees specifically involved in the handling of nuclear weapons or nuclear materials;

(C) any agency with an agency-wide drug-testing program in existence as of September 15, 1986; or

(D) any component of an agency if such component had a drug-testing program in existence as of September 15, 1986.

(2) The Departments of Transportation and Energy and any agency or component thereof with a drug-testing program in existence as of September 15, 1986—

(A) shall be brought into full compliance with Executive Order Numbered 12564 no later than the end of the 6-month period beginning on the date of the enactment of this Act; and

(B) shall take such actions as may be necessary to ensure that their respective drug-testing programs or plans are brought into full compliance with the mandatory guidelines published under subsection (a)(1)(A)(ii) no later than 90 days after such mandatory guidelines take effect, except that any judicial challenge that affects such guidelines should not affect drug-testing programs or plans subject to this paragraph.

(c) In the case of an agency (or component thereof) other than an agency as defined by subsection (a)(2) or an agency for component thereof covered by subsection (b), none of the funds appropriated or made available by this Act, or any other Act, with respect to any fiscal year, shall be available to administer or implement any drug testing pursuant to Executive Order Numbered 12564, or any subsequent order, unless and until—

(1) the Secretary of Health and Human Services provides written certification with respect to that agency (or component) in accordance with clauses (i) and (iii) of subsection (a)(1)(A);

(2) the Secretary of Health and Human Services has submitted a written, detailed analysis with respect to that agency (or component) in accordance with subsection (a)(1)(B); and

(3) the Director of the Office of Management and Budget has submitted a written, detailed analysis with respect to that agency (or component) in accordance with subsection (a)(1)(C).

(d) Any Federal employee who is the subject of a drug test under any program or plan shall, upon written request, have access to—

(1) any records relating to such employee's drug test; and

(2) any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings, as referred to in subsection (a)(1)(A)(ii)(III).

(e) The results of a drug test of a Federal employee may not be disclosed without the prior written consent of such employee, unless the disclosure would be—

(1) to the employee's medical review official (as defined in the scientific and technical guidelines referred to in subsection (a)(1)(A)(ii));

(2) to the administrator of any Employee Assistance Program in which the employee is receiving counseling or treatment or is otherwise participating.

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(3) to any supervisory or management official within the employee's agency having authority to take the adverse personnel action against such employee; or

(4) pursuant to the order of a court of competent jurisdiction where required by the United States Government to defend against any challenge against any adverse personnel action.

(f) Each agency covered by Executive Order Numbered 12564 shall submit to the Committees on Appropriations of the House of Representatives and the Senate, and other appropriate committees of the Congress, an annual report relating to drug-testing activities conducted by such agency pursuant to such executive order. Each such annual report shall be submitted at the time of the President's budget submission to the Congress under section 1105(a) of title 31, United States Code.

(g) For purposes of this section, the terms "agency" and "Employee Assistance Program" each has the meaning given such term under section 7(b) of Executive Order Numbered 12564, as in effect on September 15, 1986.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

The conferees recommend language to restrict Federal employee drug testing initiated under Executive Order 12564 until certain conditions have been met. Some of the most important concerns addressed in this language are as follows:

(I) *Uniformity is achieved among plans developed by agencies to assure that Federal workers employed by different agencies who are similarly situated receive similar treatment, and that random testing of Federal employees is not implemented on an ad hoc basis.*

(II) *Reliable and accurate drug testing is undertaken through the enforcement of rigorous laboratory procedures as well as strict procedures governing the chain of custody of specimens;*

(III) *Current law protections afforded Federal employees are continued in agency drug testing programs, specifically protections of the rehabilitation and Civil Service Acts;*

(IV) *The costs of the Federal Government's Drug Testing Program are known before implementation of testing;*

(V) *Full access to drug testing records of employees is assured to those employees;*

(VI) *Confidentiality of drug testing results is protected; and*

(VII) *Continued, centralized oversight of the Federal Government's Drug Testing Program exists.*

The conferees note that the key element for any testing program is the credibility of the laboratory standards. Such standards must be as rigorous as possible, and to ensure this, an opportunity for public and expert review of these standards has been provided by the conferees. Such standards should provide at a minimum for: strict chain of custody procedures, such as qualified collection site monitors, sterile sample taking, and direct labeling, handling, and testing standards which use the best available technology for ensuring the full reliability and accuracy of drug tests.

To ensure that these standards are carefully adhered to by laboratories, the mandatory guidelines must provide for periodic review and clear standards for revocation of laboratory certification. It is the expectation of the conferees that such review would occur frequently but no less than once a year.

In order to protect the public health and safety, the conferees have exempted the Department of Transportation and certain em-

ployees within the Department of Energy, as well as all those agencies or components of agencies which were testing when the executive order was issued. A complete listing of those agencies follows:

The Department of Transportation;

Those employees of the Department of Energy directly responsible for handling nuclear weapons or nuclear fuel;

The Central Intelligence Agency;

The Bureau of Prisons;

The Drug Enforcement Administration;

The Federal Bureau of Investigation;

The Immigration and Naturalization Service;

The Department of the Army;

The Customs Service;

The Bureau of Alcohol, Tobacco, and Firearms; and

The Secret Service.

These agencies may continue and modify current drug testing programs. However, it is the conferees intent that these exempted agencies comply fully with the executive order within 6 months and the provisions of this Act by the dates specified. The conferees direct that these agencies complete the reporting certifications to the Congress required by this act of other agencies implementing drug testing under Executive Order 12564.

The conferees are concerned that existing law does not provide an employee easy access to the results of the employee's drug test and the laboratory certification and review results. By guaranteeing such access upon the written request of the employee, the conferees have assured that each employee will be afforded such access.

The conferees are also concerned that access to the results of an employee's drug test is carefully defined to avoid misuse and the possibility of criminal prosecution or any adverse action by any other agency or individual. The drug test results therefore may only be released to specifically defined persons within the agency and in any other circumstances only with the voluntary written permission of the employee.

Finally, the conferees are aware that the legality and constitutionality of drug testing of Federal workers is currently undergoing extensive litigation. Because of this, it is the conferees intent to remain neutral on these issues until the courts have made final rulings. Therefore, this language should not be construed as either supporting or opposing the constitutionality of Executive Order 12564.

Amendment No. 417: Restores language inserted by the House and stricken by the Senate which mandates that certain information be provided to the Committees on Appropriations prior to centralizing, consolidating or re-deploying Customs Service Air Operations.

The Conferees concur with the House provision which would require the Secretary of the Treasury to report to the Committee on Appropriations of the House and Senate before implementing any centralization, consolidation, or redeployment of Customs air operations. However, the Conferees intend that this language shall only apply to permanent centralizations, consolidations, or redeployment of Customs air operations, rather than to routine or special temporary operations that are conducted during the regular course of Customs air interdiction mission activities.

Amendment No. 418: Deletes language proposed by the House and stricken by the Senate regarding transfer or sale of the Customs House in Boston, Massachusetts.

Amendment No. 419: Restores language proposed by the House and stricken by the Senate, with a change in the first section number from "506" to "508". The House

language restored by the conference agreement prohibits the Department of Transportation or the Maritime Administration from using funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administration for purposes of administering the Merchant Marine Act, 1936, as amended, to propose, promulgate or implement any rule or regulation concerning vessels which repaid subsidy under the rule issued by the Secretary of Transportation on May 3, 1985, and vacated by the U.S. Court of Appeals for the District of Columbia on January 10, 1987; conduct any adjudicatory proceeding; execute or perform any contract; or participate in any judicial action concerning repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 508 of the Merchant Marine Act of 1936, as amended. The language also provides that the restrictions on the use of such funds do not apply to the extent that such expenditures relate to a rule which conforms to statutory standards hereafter enacted by Congress. The Senate bill contained no provision on this matter.

Amendment No. 420: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment as follows:

In lieu of the matter stricken, insert the following:

Sec. 506. Notwithstanding any other provision of this Act; appropriations made by title I of this Act for the following account shall be as follows:

Immigration and Naturalization Service, Salaries and Expenses, \$137,214,000

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

Amendment No. 421: Deletes language proposed by the House that prohibits funds for the closing of FAA's flight service station located at Youngstown, Ohio.

The conferees direct the Federal Aviation Administration to abide by the 1973 stipulation between the City of Youngstown and the FAA that this flight service station will not be closed until further authorized by Congress.

Amendment No. 422: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment changing the first section number. The Senate amendment agreed to by the conference repeals the provision included in the Department of Justice Appropriation Act, 1987 which prohibited immigration pre-inspection services at Shannon International Airport or Gander International Airport.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

Amendment No. 423: Deletes Sec. 506 proposed by the Senate which would have extended the public information period associated with employer sanctions of the Immigration Reform and Control Act from six months to ten months.

The Conferees wish to emphasize that it is not their intent to legislatively delay the implementation of employer sanctions. Instead, the following language is intended to clarify and delineate those administrative policies of the Immigration and Naturalization Service (INS) which recognize that some employees are not at this time fully aware of the requirements and their responsibilities under the Immigration Law.